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THE VALUATION OF PUBLIC UTILITIES FOR THE PURPOSE OF RATE MAKING

By E. J. Plunkett of the Denver Bar

A PUBLIC UTILITY is defined as: An enterprise which has dedicated its property to a public use, and supplies a commodity or renders a service of a public necessity to the public. The enterprise may be under public or private ownership.

The valuation of a public utility for the purpose of rate making is only one of the powers and duties of the governing commission or board. However, the problem of valuation is the chief and most persistent difficulty, encountered by courts, commissions and the utilities, in the regulation of utilities. The power to regulate utilities is not a matter of contention. Ever since the Granger cases, particularly Munn v. Illinois, 94 U. S. 113 (1876), it has been conceded that public utilities may be regulated under the police power of a state.

The proper theory of the valuation of public utilities has been an unending source of trouble to the Interstate Commerce Commission, State Commissions, State and Federal Courts and the United States Supreme Court.

It is thought by many of the lay public that the public utilities and public service corporations in fixing rates strike upon an arbitrary figure as the rate which is to be charged the public for the commodity or service used. This is not the case. Aside from the fact that public utilities sometimes contract with a municipality as to the rate to be charged the public for a commodity or service, the usual procedure is by the valuation of the property of the public utility for the purpose of arriving at a fair and just rate, fair and just both to the public and the utility. This procedure is comparatively recent and has

developed since the decision in 1898 of Smyth v. Ames, 169 U. S. 466.

When a valuation is found it is denominated the rate base. A public utility is justly entitled to earn on the monetary value of its property used and useful the same rate of return that it would or could receive if the value of its property, in money, were invested in good securities at the market rate of return. Consequently, one of the first steps to be taken in establishing a rate to be charged the public by a public utility is to ascertain the fair value of the property used and useful by the utility in supplying a commodity or service at the time of the appraisal.

This article is to treat more the different theories of valuation and the disputatious differences between the different theories rather than the elements and things that go to make up the total final value or rate base arrived at under whatever theory of valuation is used.

VALUATION THEORIES.

The theories or methods used in the valuation of public utilities property are:

(a) Original cost, sometimes called Actual cost or Historical Cost.

(b) Cost of Reproduction or Replacement Cost.

(c) The Prudent Investment Theory. (proposed)

(d) Present Value.

Cost and value in public utility regulations are not synonymous. Advocates of original cost or original cost to date contend that no greater "value" should be placed upon a plant or system than it actually cost to date and that therefor the "value" to be given a particular plant or system is its "cost". To determine this cost under this theory recourse must be had to the records or books of the company. It has invariably developed, in the earlier cases, that the records were lost or the books were not properly kept, and were therefore of no evidentiary value. Again no value is given to the unearned increment, e. g. in real estate, or to franchise value, strategic value, going value, good-will, or earning power. The real estate may have been, as often was the case, in the first instance a gift from the community to induce the establishment of a

public utility in the community. This theory, for many reasons, was not satisfactory to the utilities. Nor were the courts, in many instances, favorable to this theory. In Wilcox v. Consolidated Gas Co., 212 U. S. 19, Judge Peckham said:

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule."

In the Minnesota Rates Cases, Justice Hughes, now Chief Justice, announced:

"It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost."

Some more equitable rule to determine fair value had to be evolved, and out of the dissatisfaction with the original cost theory grew the Cost of Reproduction theory. Cost of reproduction while not amenable to strict definition may be somewhat defined as follows: That amount of money or estimated investment which would be required to reproduce the same or existing plant or system if the existing plant were nonexistent, but not to reproduce an equally effective plant.

In estimating the "cost of reproduction new" of an existing railroad, Vanderblue in Railroad Valuation depicts the following mental picture:

"The road bed is assumed to disappear, and in place of the smoothed and well-tended grade the conditions met at the time of construction are restored. The right of way and terminal properties pass into private hands to be devoted to the same use as adjoining tracts. The equipment vanishes, the working force is scattered. The very corporate existence ceases. * * * The population, rural and urban, does not desert the line of the road; busy factories and warehouses stand at the edge of a primeval right of way, which is overgrown with trees and underbrush. Everything awaits the advent of the courageous promoter who shall place surveying parties in the field, secure the charter, arrange financial matters: in short, set out to restore the plant of the road which in imagination has been made to disappear, yet which in fact exists. What will it cost?"

The cost, arrived at under this theory, will be cost of reproduction new. But the cost of reproduction theory did not fully meet the need and was subjected to as much criticism as the original cost theory. Whitten in his work, Valuation of Public Service Corporations, 2nd ed. Sec. 324, says:

"Cost of reproduction may mean the cost of a substitute plant of the most modern, approved design capable of performing the same service as the existing plant. If the old plant were wiped out, what would it cost at present to construct a plant capable of performing the service now performed by the old plant? In the case of a water plant, perhaps an entirely new source of supply would be used and the distribution system radically changed; in the case of a gas plant, a different process of production employed and a few large gas holders substituted for many small ones; in the case of an electric plant, larger units of production employed; in the case of a railroad, there might be a radical relocation and realignment of roadbed, and important changes in methods of construction. The present value of the old plant is measured by the cost of an equally efficient new plant less an allowance for the depreciated condition of the old plant. This seems to be the most logical method of arriving at present structural value. One difficulty in applying it arises from the fact that in many cases it is exceedingly difficult and expensive to determine on an equally efficient substitute plant."

Further in this same work at page 646, it is said:

"The difficulties of the reproduction method were also discussed in Fuhrmann v. Cataract Power and Conduit Company, * * * Chairman Stevens said: 'This method of ascertaining the fair amount of the investment, although it has been treated with favor, is also subject to severe criticism. This first arises from the practical impossibility of ascertaining with any reasonable degree of accuracy the cost of reproduction new. This impossibility has been demonstrated in most attempts which are made.' "

Pond on Public Utilities, 3rd ed. Sec. 594, says:

"*Reproduction less depreciation.*—The adoption of the theory of reproduction is attended with practically all the difficulties of that of original cost, and the application of either must be attended with a reduction of the amount of the depreciation which the plant has sustained, except so far as its parts may have been repaired or replaced; nor does the theory of the original cost or the cost of reproduction take into account a valuation of the plant as a going concern with an established income. This element of value is generally accepted and is to be added to original or reproduction costs."

Of late years the Prudent Investment Theory has been advanced by some authorities as the proper rule to use in valuation cases. This theory is not in general use and is only recommended. Justice Brandeis is an advocate of the pru-

dent investment theory. However, the United States Supreme Court is not of the same opinion as Justice Brandeis. Prudent Investment means what it implies, i. e., investments made prudently. It precludes the idea of giving value to investments made with poor or bad judgment, losses sustained through poor management, excessive salaries and excessive promotional and organization expenses. This feature of the prudent investment theory, of course, is not objectionable to the fair mind, but in the last analysis it is akin to original or actual cost and differs from actual cost in that actual cost may embody imprudent investments and expenditures. In the Southwestern Bell Telephone case, 259 U. S. 318, Justice Brandeis, in dissenting from the majority opinion, said:

"The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion. It would not fluctuate with the market price of labor, or materials, or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, commissions, or courts. It would, when once made in respect to any utility, be fixed for all time, subject only to increases to represent additions to plant, after allowance for the depreciation included in the annual operating charges."

There is another suggested test to determine value. It is Outstanding Capitalization. Some persons contend that the value of a utility is to be measured by its outstanding capitalization. Advocates of this method advance the argument that since the issuance of stocks and bonds of public utilities is under the control of the regulating body that the rate of return to the utility should have some relation to the outstanding securities. But when it is considered that it is the valuation of the physical property of the utility that is sought and not its nominal "paper" value it is clear that there may be a wide discrepancy between actual present value of a company and its outstanding capitalization.

Present value is the true and only test of the fair value of a utility, be that present value arrived at by one or all of the known theories. The United States Supreme Court in

Smyth v. Ames, before the term "Present Value" was coined used the phrase "the present as compared with the original cost of construction."

Many proposed suggestions to determine fair value were offered as the true test, such as the valuation for taxation, valuation for condemnation proceedings and valuation for bargain and sale or market value. For obvious reasons these proposed methods met with failure. Tax laws differ widely. Taxation may in part be based upon market value and earning power of a utility. The market value and earning power of a utility is dependent upon the rate to be charged. It is, therefore, folly to use taxation value to determine rates when market value or earnings are not established until the rate is established. The same is true of the condemnation theory. Intangibles are valued in condemnation proceedings but not all intangibles are valued in rate making proceedings. As to the purchase and sale or market value theory, apart from other objections, a very material objection is that it isn't every day that a public utility has a ready and willing purchaser or a quoted market value. Market value depends upon earnings, earnings depend upon rates, and rates are what are sought to be established. It is vicious circle reasoning.

THE CASES.

Smyth v. Ames, supra, in valuation proceedings for rate making is the landmark case, and though decided thirty-two years ago is still controlling, notwithstanding that Justices Holmes, Stone, and Brandeis do not agree with it. In it the matters to be taken into consideration in valuation proceeding for rate making are thus set out:

> "In order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Many authorities quarrel with this decision, but Justice Hughes, in the Minnesota Rate Cases, Shepherd v. Simpson, 230 U. S. 352, adhered to its principles. Likewise did Justice McReynolds, who wrote the majority opinion in the O'Fallon case, St. Louis and O'Fallon Ry. Co. v. U. S., 42 S. Ct. 384, (May 20, 1929), the opinion saying:

> "The elements of value recognized by the law of the land for rate making purposes have been pointed out many times by this Court. Smyth v. Ames."

The O'Fallon case was a recapture case and not a rate making case, but the elements of valuation are the same in recapture cases as in rate making cases.

The decided cases follow Smyth v. Ames in general, with some deviations dependent upon the facts of the cases. The principal cases are Reagan v. Farmers, etc., 154 U. S. 362, Knoxville v. Knoxville, etc., 212 U. S. 1, Minnesota Rate Cases, supra, Southwestern Bell Tele. Co. v. Pub. Service, etc., 262 U. S. 276, Bluefield, etc., v. Pub. Service Com., 262 U. S. 679, McCardle v. Ind., etc., 272 U. S. 400.

Whenever a proposed valuation and rate is fixed by a regulating commission or board, which is not satisfactory to the utility or public service corporation, the utilities seek an injunction setting up the allegation that the valuation and rate discriminate, and are confiscatory and deprive the utility of its property without due process of law under Articles V and XIV of the Amendments to the United States Constitution or the similar provisions in state constitutions.

The utilities now advocate the cost of reproduction theory. William Jennings Bryan was counsel for the State of Nebraska in Smyth v. Ames and in that case contended, and most firmly, that the true test of the value of a railroad for rate making purposes was the cost of reproduction. The railroads then were contending that the only right basis of value for the purpose of rate making was original cost. Were the case of Smyth v. Ames to be reargued now by the same attorneys who argued in 1898, they would simply trade theories and could, with grace, exchange briefs, each contending for a change of theory. Economic conditions and the changing value of the

dollar are the real causes responsible for the differences of opinion concerning valuation theories.

It would seem that some more satisfactory and quasi permanent method of determining fair value is desired by all concerned, not to forget the consumer and stock and bond holder. Of late years the consumer of the commodity of a public service company—public utility—is also in many instances a holder of the company's stock or bond. If he as a consumer demands a lower rate for the commodity he uses, he can only expect to receive a decreased dividend on his security. If he wishes a larger dividend on regular average earnings, he can only expect to pay a higher rate for the commodity or service. He is in a dilemma.

The State of New York has recently appointed a Special Legislative Commission on the Revision of Public Service Commission Law with the idea of formulating policies and principles dealing with public utilities. To allow the public utility, in valuation proceedings, a present fair value is beside the point. The difficulty lies in the method or ways of arriving at the fair value. This commission is divided as to which of two plans is the more feasible. The majority recommend that the local State Commission contract with the utilities respecting their individual valuations for ten year periods, thus crystallizing or "freezing" a definite valuation for ten years, allowing, however, for value fluctuations according to the swing of prices of labor and materials and other factors affecting values. The minority desire to establish a permanent "frozen" valuation based on the theory of prudent investment. The minority plan is called the Bauer plan, Bauer being the author of several works on public utility regulation.

Whether the rule laid down in Smyth v. Ames is correct or not or whether it should be overruled remains to be seen. Eminent jurists and writers contend the rule is obsolete and does not meet the changed economic conditions. The criticism of Smyth v. Ames by Justice Brandeis has much merit. His theory might, perhaps, establish a fixed method of valuation that would protect the rights of all concerned. He says in the Southwestern Bell Telephone Co. case, supra, at page 308:

"What is now termed the prudent investment is, in essence, the same thing as that which the court has always sought to protect in using the term present value. Twenty-five years ago, when Smyth v. Ames was decided, it was impossible to ascertain with accuracy, in respect to most of the utilities, in most of the states in which rate controversies arose, what it cost in money to establish the utility; or the money cost with which the utility was established; or what income had been earned by it; or how the income had been expended. It was, therefore, not feasible, then, to adopt, as the rate base, the amount properly invested or, as the rate of fair return, the amount of the capital charge. Now the situation is fundamentally different. These amounts are, now, readily ascertainable in respect to a large, and rapidly increasing, proportion of the utilities. The change in this respect is due to the enlargement, meanwhile, of the powers and functions of state utility commissions. The issue of securities is now, and for many years has been, under the control of commissions, in the leading states. Hence the amount of capital raised (since the conferring of these powers) and its cost are definitely known, through current supervision and prescribed accounts, supplemented by inspection of the commission's engineering force. Like knowledge concerning the investment of that part of the capital raised and expended before these broad functions were exercised by the utility commissions has been secured, in many cases, through investigations undertaken later in connection with the issue of new securities or the regulation of rates. The amount and disposition of current earnings of all the companies are also known. It is, therefore, feasible now to adopt as the measure of a compensatory rate—the annual cost, or charge, of the capital prudently invested in the utility. And hence it should be done."

Until some better theory is evolved Smyth v. Ames is the guiding beacon.

Referring again to the recent action taken by the State of New York in appointing a Special Legislative Committee for the purpose of formulating policies and principles dealing with public utilities, Bauer, in Public Utilities Fortnightly, April 3, 1930, has written an article discussing the Bauer plan and the Prendergast plan. In a foot-note he says:

"Since the above was written, the Revision Commission has made its report to the New York Legislature. There was a majority and minority report. The latter adopted the Bauer plan and incorporated it in a proposed bill. The majority agreed that a fixed rate base and return are essential to affective regulation, but instead of the mandatory provisions, it proposed to include the plan in contracts between the state and the companies; it doubted whether a mandatory system could be enforced against a shift to higher or lower prices. The minority believed that the contract plan would not be accepted by the companies on a reasonable basis. While it admitted that there may be a constitutional question as to the mandatory provisions when prices have risen or fallen sharply, it believed the policy would be

sustained because of its inherent reasonableness and because of its necessity on administrative and financial grounds."

It will be interesting to read the act that will be passed, if passed, growing out of the "proposed bill". Perhaps out of this action by the State of New York may spring a nucleus from which may emerge a solution of the vexing and at the present time refractory theories of valuation.

COLERIDGE DIDN'T TELL IT ALL

"In Xanadu did Kubla Kahn
A stately pleasure dome decree,
Where Alph, the sacred river ran,
Through caverns measureless to man,
Down to the sunless sea."
He ran the place a month or two
And kept things going pretty free,
And then his creditors put him through
Involuntary bankruptcy.

J. H. DENISON.

THE MILITARY COURTS OF THE UNITED STATES

By Samuel H. Sterling of the Denver Bar

MOST laymen, and even some of the members of the Bar, do not know that our present system of army courts-martial has as distinguished an ancestry and almost as ancient a pedigree as our system of Common Law. During the Middle Ages, in keeping with the ideas of that time, a commander of any army, or any of the commanders of units under him, had absolute and complete control over his soldiers, even to the extent of pronouncing the death penalty summarily. However, even during this period, in times of peace, all soldiers were entitled to some form of a trial for any offense committed by them. At this trial the commander sat as the sole and only judge, but he was required to proceed thru the formalities of the trial at that period, whatever they might have been.

In our own country, the old "common law military" was recognized as an actuality even before the Constitution was adopted. All during the Revolutionary War, and under the Articles of Confederation, the Commander-in-Chief of the army was authorized to convene courts-martial in accordance with the "common law military". Washington acted as one of the judges during the winter at Valley Forge, and other regular courts-martial were convened from time to time upon order of General Washington.

Upon adoption of the Constitution the authorization for a system of courts-martial was found in that provision in the Fifth Amendment to the Constitution which excepts "cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger," from the Bill of Rights, and from the procedure of the ordinary civil courts. The Supreme Court has also interpreted that part of the Second Article of the Constitution which makes the President the "Commander-in-Chief" of the army and navy, as carrying with it the power to convene courts-martial in accordance with the ancient "common law military".

So much for the authorization of a system of courts-martial. The present system of courts-martial is the result of the

passage of numerous acts by Congress, and the installation of many ramifications of the acts by Presidents under their authority as Commander-in-Chief. Congress, under its constitutional power to make rules and regulations for the government of the land and naval forces, passed the Articles of War (Chapter Two, National Defense Act of June 4, 1920) which introduced many new features hitherto not used, and under which the present system of courts-martial is conducted and governed. The Articles of War really constitute the army penal code, and are the basis for its code of criminal procedure. They are supplemented by the Manual for Courts-Martial prescribed by executive order of President Coolidge. The Manual is, really, the army code of criminal procedure.

The jurisdiction vested by the Articles of War and the Manual of Courts-Martial is by no means a mere emergency investiture. It is the same in time of peace as in time of war, and the courts-martial is a regular military tribunal, administering the military law, which is that law which governs the military forces, alike in peace and in war, at all times and in all places, wherever they may be. Of course, the jurisdiction of the courts-martial extends only to criminal or tortious cases, dealing with offenses charged against members of the military establishment, but within its scope, it is not an inferior court. As to cases within its jurisdiction its decision is final, as far as review or further examination by any civil court or tribunal is concerned.

The court is composed of commissioned officers appointed by an authority holding a military command. Three kinds of courts-martial exist in the army: the Summary Court-Martial, one officer, usually the commanding officer of a troop or company, for the disposition of minor cases; the Special Court-Martial, three or more officers for the trial of more serious cases, which may adjudge confinement at hard labor in the guard house or army disciplinary barracks with forfeiture or detention of not exceeding two-thirds pay for not longer than six months, but has no power to separate any person from the military services; and, third, the General Court-Martial consisting of five or more officers for the trial of serious cases. The General Court-Martial may adjudge any punishment warranted by law, including death, confinement either in the

army disciplinary barracks or in a Federal penitentiary, dismissal of an officer, or dishonorable discharge of an enlisted man.

Besides the officers constituting the court-martial, there is an official prosecutor, called the Trial Judge Advocate, and also an official defense counsel provided as part of the regular personnel of the court. The defense counsel and the Trial Judge Advocate are both legal advisers of the Court, and are also, usually, both officers of equal rank, thus intending to show and convey an idea of equality in the representation to the accused. The accused has the privilege of retaining civilian counsel, if he so wishes, however, by actual experience the soldiers have come to know and recognize the worth and sincerity of defense counsel appointed for them, and usually accept the appointed counsel.

Under the revision of the Articles of War in 1920, there must be appointed, for all General Court-Martials, a Law member. That is, one of the members of the Court-Martial must be an officer of the Judge-Advocate General's Department, or if one is not available for the purpose, the appointing authority details another officer—selected—as specially qualified to perform the duties of the law member. This law member rules in open court on all interlocutory questions, other than challenges, arising during the proceedings. Upon questions other than of the admissibility of evidence, the court does have the power, by majority vote, to override his rulings; but, in practice, rarely, if ever, does so. He is a member of the court, and like the other members, has a single vote on the findings and the sentence. A reporter and interpreter may be appointed, and the necessary clerks and orderlies are detailed for the trial.

After the arrest and confinement of the accused, a formal written accusation is made consisting of "the technical charge" and "specification". The charge merely indicates what Article of War the accused has violated, while the specification sets forth the specific facts and circumstances relied upon as constituting the violation. Each specification, together with the charge under which it is placed, constitutes a separate accusation, or indictment. Any person subject to military law

may prefer charges, even tho at the time of preferment he is himself a prisoner.

Upon the preferment of charges, immediate steps are taken to draft the charge and specification. This is always couched in simple language, a specimen of which, is:

Charge I: Violation of the 93rd Article of War.

Specification: In that Richard Roe, did, at Fort Logan, Colorado, on or about May 13, 1930, feloniously take, steal, and carry away a diamond ring, value about $100.00, the property of John Doe.

No charge is preferred for trial until after a thorough and impartial investigation is made. Witnesses are examined, and evidence is taken by the commanding officer present, and a report is made of the charges accompanied by a statement of the substance of the testimony taken on both sides. A recommendation of the examining officer as to what disposition of the case he suggests, and also a statement of any reasonable ground for the belief that the accused is, or was at the time of the offense, mentally defective, deranged, or abnormal, is also sent in with the report. These charges are then forwarded to the commanding officer who has the authority to appoint a court-martial, along with any related papers and any available evidence of previous convictions. The appointing authority may, in his discretion, suspend action on the charges, pending a report of a medical examining board, appointed for the purpose of examining an accused where the forwarding officer reports that in his opinion the accused is, or was at the time of the commission of the act, mentally unsound.

Before the trial begins, both the Judge Advocate (the prosecution) and the defense are each allowed one peremptory challenge of the judges who are appointed to sit in the trial, except, of course, in a summary court-martial, since in that case there is only the one officer acting as judge. If any of the officers appointed as judges know of any reason why they should not serve as judges, it is their duty to express these reasons and ask that they be excused from sitting as judges. Any of the judges might also be challenged for cause on the grounds that the challenged member is not competent or is not eligible to serve on courts-martial; that he is not a member of the court; that he is the accuser as to any offense charged;

or that he has already come in contact with the case in some manner, or will receive it as a reviewing authority, or for other reasons. After the challenge is given and argument heard, the court votes upon the challenge by secret written ballot, and the majority vote governs as to whether the challenged member shall remain as a court member or not.

After the proceedings as to challenges are concluded, the members of the court and trial judge advocate are sworn, each taking an oath that he will endeavor to mete out Justice impartially, and judge the accused upon the evidence admitted. After the oath is taken, the accused is arraigned and asked how he intends to plead upon each specification. After this, pleas may now be made to the jurisdiction, in abatement, in bar of trial by reason of the Statute of Limitations, or by reason of a former trial. The plea to the jurisdiction may be made at the beginning of the trial or any time during the trial, while the other pleas should be made at the beginning of the trial. A motion to sever may be made by one of two or more joint accused who wishes to be tried separately from the other or others; or a motion to strike out on the grounds that the specification does not state any crime or offense may be made. These two motions should be made upon arraignment. A motion for findings of not guilty may be made at the close of the trial. A Nolle Prosequi may be entered by the prosecution upon order of the appointing authority upon the conclusion of the trial, but this can only be made by his order.

The trial is then continued in much the same order as a civil trial. Both sides make their opening statement, the prosecution puts on their witnesses, and the defense puts on their witnesses. At the close of the trial, each side sums up their case, and the court-martial then retires to render its decision. After the judges have retired, they re-argue the case among themselves as to the salient points or features of the trial, and they then vote. Voting is by secret written ballot, the members first voting as to the guilt or innocence of the accused. A two-thirds vote of the members present is sufficient for conviction and for the determination of the sentence; except, in case of a general court-martial, to adjudge penitentiary confinement for more than ten years, or for life, a three-fourths vote is necessary; and that the death penalty can be

imposed only by unanimous votes, both on the findings of guilty, and for the imposition of the sentence. If the accused is voted guilty, a second vote is then had as to his punishment. Each judge can vote the penalty he believes should be imposed, and the majority voting a certain penalty imposes that penalty upon the accused, except in case of a death penalty, in which case the vote must be unanimous. All the members must vote as to the penalty regardless of his vote upon the findings.

An automatic appellate review is supplied for every general court-martial trial. A transcript of record, including the testimony, is given the accused, as a matter of right, and without expense to him. The sentence imposed has no force until formally approved by the commanding general or other authority appointing the court; and this authority in turn refers the record to the reviewing authority of his Staff Judge Advocate or to the Judge Advocate General. The Board of Review, in the office of the Judge Advocate General, is a true appellate court. However, execution of the sentence in the meantime is not held up in the less important cases. In other words, as to the serious sentences, there is an automatic appeal, before execution; as to all the other cases an automatic writ of error is given, which does not delay the execution of the sentence. The sentence may be either affirmed, reversed, or sent back for a new trial.

All the ordinary rules of admissibility of evidence applies with equal stringency to a court-martial as well as a civil trial. The Articles of War, besides providing for the usual crimes and misdemeanors contained in any Code of Criminal Procedure, also lists a series of purely military crimes, such as, desertion, disobedience to orders, disrespect to superiors, and acts dealing with military property, or with the relations between a soldier and the civilian population.

In general, reviewing authorities for the army courts, including the Board of Review and the Judge Advocate General, are guided by substantially the same principles which guide civilian appellate courts. There is one difference, however, which at first glance must seem quite startling to a member of the Bar. In 1916 an Article of War was adopted providing that:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the grounds of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused."

This reverses the presumption of fatality of error, but as a matter of experience this eliminates many miscarriages of justice, and avoids the necessity of many new trials, without, in turn, imposing too much of an injustice upon the accused.

This detailed explanation of procedure applies mainly to a general court-martial, but with only slight differences, this is the procedure in a special court-martial, also. The summary court-martial being composed of only the one commanding officer deals only with smaller, less important cases, and is more in the nature of a disciplinary court. The three things in which the army in recent years has departed rather notably from the practice of the civil courts are: First, the reversal of the presumption of the fatality of procedural errors in the trial; Second, the automatic appellate review of every general court-martial case, without any request by the accused and without expense to him; and, Third, the institution of the official defense counsel at the trial for every case, and as a part of the regular personnel of the court.

In this bare skeleton of the general procedure of an army courts-martial I have tried to show you how closely it resembles and developed along the same lines as has the mother-tree of law, our own common law. It is interesting not only because of its age and ancestry, but because it has kept pace and developed as fast as our civil procedure. In fact, not only has it developed as fast as our civil procedure, but in some instances mentioned above has far outstripped our civil code of procedure, and can be pointed to with as much pride as any of our civil agencies for the dispensation of Justice.

NOTES ON NEW BOOKS RECEIVED AT SUPREME COURT LIBRARY*

Clark on Receivers. By Ralph E. Clark, of the Cincinnati Bar. 2nd Ed., 1929, 2 vols., pp. 2053. The W. H. Anderson Co., Cincinnati. The First edition published in 1918 has proved its usefulness as an analytical treatise on the subject, so much so perhaps that it has become the standard work on the subject. As stated in the Preface to the Second Edition "The law has been developed and expanded". While this work is said to be a treatise yet it is mostly used as a reference work. The new edition is superior to the first in that it discusses more fully the fundamental questions of Receivorship.

Corporate Advantages without Incorporation. By Edward H. Warren, Professor of Law at Harvard. Baker, Voorhis & Co., New York, 1929, pp. 1012. The title does not accurately define the contents of the book. As stated in the introduction, the scope of the book is "to inquire whether today it is proper for the courts to treat a body of men who have united to further their financial interests as a legal unit, when there is no legislative authority for so doing." The author then proceeds to investigate the various statutes on the questions involved and judicial interpretation of same. In discussing the Colorado law a very interesting brief is written on the construction of Secs. 48 and 255 of the Code of Civil Procedure. The work has real value and would be helpful to anyone making an extensive examination of the law relating to unincorporated associations.

Code of Laws of the United States. 61 volumes. West Publishing Company and Edward Thompson Company. This new Code is the latest annotated edition of all the general and permanent laws of the United States. It is kept up to date by an annual cumulative supplement which is to be found in a pocket arrangement in the back of each volume, and also by quarterly pamphlets which contain laws and annotations supplementary to the latest pocket part. The Code includes also a considerable amount of historical data, showing the antecedents of the particular laws, with comments on the sources and the character of the changes. The first three volumes contain the Constitution fully annotated. The last volume contains a complete index to all the laws, and also a chronological table which shows where the various laws contained in former statutes are to be found in the Code. List of tables so represented are: Revised Statutes, Statutes at Large, U. S. Compiled Statutes, Federal Statutes, Judicial Code, Criminal Code, Bankruptcy Act, and a table of repealed Acts. Also in this volume is a "Table of Acts cited by popular names". To illustrate, in its alphabetical order may be found "National Prohibition Acts, Oct. 28, 1919, C. 85, 41 Stat. 305 (T. 27)", etc., which means of course that this law was enacted on the date mentioned and is chapter 85, United States Statutes at Large, page 305, and is to be found in the volume of Title 17, in the U. S. Code Annotated. By using the tables this same Act could readily be found in any of the other statutes above mentioned. Any other Act which has a popular name, i. e., Sherman Anti-Trust Laws, may be readily found by turning to this table. Due also to the many new editorial features, the convenient size of the volumes, and the well known reputation of the publishers, makes this a very excellent work on the subject.

Handbook of the Law of Code Pleading. By Charles E. Clark, Professor of Law at Yale University. West Publishing Co., (Hornbook Series), 1929. A scholarly and interesting work on the subject. The opening chapter, "History, Systems and Functions of Pleading", reviews the origin and growth of pleadings system,

*EDITOR'S NOTE: It is sometimes convenient to know what recent texts, reports, etc., are available at the Supreme Court Library, and Mr. Fred Y. Holland, of the Denver Bar, Librarian of the Supreme Court Library, has kindly consented to supply Dicta monthly with brief notes as to new books received. It is hoped this service may be of service to our readers.

and contains the author's own observations upon future pleading reforms and the rule of making powers of the courts. Except for this chapter the work is devoted entirely to an analytical discussion of the problems of pleading, with the usual citations of decisions of courts, and other writers. The usual Hornbook arrangement is followed.

Hillyer's Corporate Management and By-Laws, with forms. By Curtis Hillyer, of the California Bar, 1927. pp. 1349. Bender-Moss Co., San Francisco. This is a splendid work on the subject. It covers briefly the law relating to the promotion, organization, and management of private corporations. Includes also the Blue Sky Laws of all the States. Mr. Hillyer is the author also of "Law of Evidence" and "Hillyer's Justice Code".

How to Prove a Prima Facie Case. By Samuel Deutsch and Simon Balicer, both of the New York bar. Prentice-Hall & Co., 1928, pp. 604. This work is of especial interest to students and young practitioners. As stated "it indicates the elements which are necessary to prove a prima facie case, and to demonstrate the practical application of the rules of evidence by means of questions and answers." It is essentially elementary, and should have been boiled down and sold for half the price, or published gratuitously in a law school periodical.

Morse on Banks and Banking. Sixth Edition. By Harvey C. Voorhees, of the Boston bar. Little, Brown & Co., Boston, pp. 2134. Since the publication of the First edition in 1870 this work has been generally regarded as an authority on the subject. However, beginning with the Third edition, revised by Frank Parsons in 1888, very little new matter has been added to the original text. There has been copied in the present edition some of the recent legislation on the subject, including the Negotiable Instrument Laws, and Changes in the National Banking Laws made by the McFadden-Pepper Act of 1927, and the Federal Reserve Act. Therefore the work has been expanded from one to two volumes, and publishers' price has been increased accordingly.

COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

ATTORNEY FEES—CONTRACT FOR—NOT SEVERABLE—NO. 12,577—*Mutter vs. Burgess and Adams. Decided June 23, 1930.*

Facts.—The plaintiffs, a law firm, were employed by the defendant to defend him in an Alienation of Affections suit. The written contract of employment provided for a retainer of $1,000. Of this amount, $200 had been paid, and this suit was brought for the balance. Before the determination of the Alienation of Affections suit, the defendant accused the plaintiffs of selling him out, and he also made other similarly violent remarks concerning the plaintiffs' conduct in the case. The plaintiffs promptly withdrew, and brought this action on the contract. The question presented is whether an attorney, who has withdrawn from a case before he has fully performed his contract, can recover his full fee. The trial court gave judgment for the plaintiffs.

Held.—(1) In withdrawing, they did what any self-respecting lawyers would have done.

(2) Defendant's contention that the plaintiffs could not sue on the contract, but should have sued on a quantum meruit, or for damages for the breach of the contract was without merit. Contracts of attorneys are exceptions to the rule that an "employe can recover only the difference between what he received or might have received from others and the price agreed upon."

"One reason for the exception is that such service is not easily partible or apportioned to the time or the labor performed or to be performed by the attorney. Another reason is that often the most difficult and valuable services of the attorney to his client are rendered in advising him of his legal rights before any papers are prepared or appearances made in court. Another is that by the contract the attorney loses the possible opportunity of employment by the adversary party."

Judgment Affirmed.

ACCIDENT INSURANCE—BODILY INJURIES—EVIDENCE—NO. 12263—*Bickes vs. The Travelers Insurance Company—Decided April 14, 1930.*

Facts.—Margaret Bickes brought this action against The Travelers Insurance Company for $10,000 on an accident insurance policy issued to her husband, Roy W. Bickes. The evidence showed that plaintiff and the decedent had been married for six years; that decedent was in good health; that on October 1, 1927, he was in Trinidad, Colorado on business and telephoned plaintiff saying that he would be home in a few days; that about a week later he came home with a bump on his forehead, elbows badly skinned, clothes soiled, etc. The attending physician testified that decedent was irrational; that he had an abrasion on the forehead which was, in his opinion, the result of an external cause. Other physicians testified similarly. At the end of the plaintiff's testimony the trial court granted a nonsuit.

Held.—The evidence was sufficient to go to the jury, and it was proper to admit the testimony of the physicians that in their opinion the injuries resulted from an external cause.

Judgment Reversed.

CANCELLATION OF DEED—CONDITIONAL DELIVERY—EVIDENCE—NO. 12,258—*The American National Bank, Administrator, Substituted for Mary E. Elwood, Deceased, vs. John L. Silverthorn—Decided April 28, 1930.*

Facts.—Mary E. Elwood, during her lifetime lived with her daughter, Martha, and Martha's husband, the defendant here. In 1919 Elwood executed a warranty deed purporting to convey to Martha certain real property. Thereafter Martha conveyed to defendant here. A little later Martha died and Elwood began this suit to set aside both the deed from her to Martha and the deed from Martha to defendant, alleging that the deed from her to Martha was delivered conditionally with the express agreement that delivery was not to become effective until Elwood's death, and then only in case Martha survived her. The complaint also alleged that defendant knew the conditions of the delivery. The trial court found, as a matter of fact, that the delivery from Elwood to Martha was

not conditional, and judgment was entered in favor of defendant.

Held.—There is sufficient evidence to support the judgment of the lower court which, therefore, will not be disturbed.

Judgment Affirmed.

CRIMINAL LAW—NO. 12368—*People vs. Mooney. Decided June 23, 1930.*

Facts.—The defendant was charged with violation of Sec. 3740 C. L. 1921 which provides that:

"This chapter shall extend to and include all theatres, circuses and shows, where an admission fee is charged for entrance thereto. No person shall be allowed by virtue of any such license to open any place of public amusement, such as a theatre, circus or show, on the Sabbath or Lord's day; but any person who shall so offend on such a day shall be fined in a sum * * *."

The case was tried on an agreed statement of facts and the court dismissed the action.

Held.—"We would be violating one of the well recognized rules of construction if we held that the statute applies to those who fail to procure a license as well as to the licensees, because the language used in the statute itself is applicable to those only who procure licenses, and those who violate other provisions of the statute by failing to procure a license, might open their theatres on the Sabbath or Lord's day, without fear of punishment. This leads to a ridiculous and absurd conclusion, amounting to punishment for one who honestly endeavors to comply strictly with every provision of the statute, and a reward to the one who violates it.

"Before the defendant can be adjudged guilty, it is incumbent upon the People to specify some particular act committed in violation of a public law, either forbidding or commanding it. The statute under consideration does not forbid the opening of a theatre on the Sabbath or Lord's day, and the defendant has not violated any express provision of the statute. We are unable to determine exactly what the legislature intended in passing this section of the statute, with a violation of which this defendant is charged. The statute under consideration is indefinite, uncertain and ambiguous; * * *"

CRIMINAL LAW—PRIOR CONVICTION—EVIDENCE—NO. 12350—*Noble O. Hamilton vs. The People of the State of Colorado—Decided April 21, 1930.*

Facts.—The evidence indicated that defendant Hamilton was engaged with others in a confidence game whereby it was

attempted to defraud a savings and loan company of a large sum of money. Defendant brought error alleging that he was convicted on the uncorroborated testimony of an accomplice and also on the ground that it was improperly brought out at the trial that defendant and one Stone had been in the penitentiary at the same time.

Held.—1. There is no rule that one accused of a crime may not be convicted on the uncorroborated testimony of an accomplice. 2. There was evidence indicating that defendant and Stone had conspired in the penitentiary to work out this fraud and it was, therefore, proper to show that they were both in the penitentiary.

Insofar as this opinion is contrary to the decision in Ryan vs. People, 66 Colorado 208; 180 Pacific 84, the earlier case is overruled.

Judgment Affirmed.

DEFAULT JUDGMENTS—PETITION TO SET ASIDE—GROUNDS FOR—NO. 12,514—*Connell vs. Continental Casualty Company et al. Decided June 23, 1930.*

Facts.—One Cunningham was granted compensation by the Industrial Commission against Connell and the Casualty Company. The Company sought a review in the District Court. Though properly served, Connell failed to appear and judgment was entered against him by default. The District Court held that the insurance policy did not cover Cunningham's injury, and the Commission was directed to dismiss as to the Casualty Company. The policy covered only those employees of Connell that worked in his home in Denver. Cunningham was injured while building a cabin for Connell at Indian Hills. Connell had been told by the insurance agent that he was covered on his risk at Indian Hills before the work was begun there. However, the proper entry had not been made on the records of the Company. Connell, by this action, seeks to set aside the default judgment, and his petition to set aside was denied.

Held.—Without deciding what relief Connell has against the Casualty Company because of the unkept promise of its agent,

(1) "Applications to vacate default judgments are addressed to the sound discretion of the trial court,"

and its decision will only be set aside when that discretion has been abused.

(2) "To entitle a party to have a default judgment set aside for the reasons assigned in this case, it must appear, not only that the default and judgment were obtained by fraud, mistake, inadvertance, or excusable neglect, but that *prima facie* there is a meritorious defense."

Judgment affirmed.

DIRECTED VERDICT—ERROR WHEN—NO. 12,197—*Sherman Mercantile Company vs. Mountain Ice and Coal Company and The Jagger Produce Company. Decided June 23, 1930.*

Facts.—Action to recover the possession of eggs which were stored by the plaintiff. The action was dismissed as to the Mountain Ice and Coal Company by stipulation. The plaintiff's evidence showed that the defendant secured merchandise consisting of 327 cases of eggs, after having procured a merchandise order in favor of one Richards, from one Davidson, an employe of the plaintiff who, at the time, stated that he had no authority to sign for the plaintiff. Previously, the defendant had secured two orders from Richards, who was indebted to the defendant, for the delivery of 51 cases of eggs which were in storage for Richards. These two orders were left blank so that the defendant could take them in such quantities as they might wish. Defendant then used one of the orders given him by Richards (for the 51 cases owned by Richards) and made it out for the 327 cases for which the unauthorized order to Richards from the plaintiff provided. Defendant then gave Richards credit on his account for the 327 cases. The entire transaction was repudiated by the plaintiff and by Richards when they learned of it, and the warehouse was given instructions not to turn the eggs over to the defendant. Plaintiff then brought this action and the court directed a verdict for the defendant.

Held.—"There was ample evidence to carry the case to the jury. It was the province of the jury to pass upon the credibility of the witnesses and the weight to be given to the testimony."

Reversed.

LANDLORD AND TENANT—PURCHASE OF TAX CERTIFICATE—INJUNCTION—NO. 12,225—*Louis Werner vs. Eugene A. Norden, et al—Decided April 28, 1930.*

Facts.—Werner, the owner of the fee title to a lot in Cripple Creek, brought an action alleging that Norden was his tenant; that defendant Sennett conspired with Norden to secure the assignment of a tax sale certificate, and thereby to obtain for Norden a tax deed to the lot. The complaint prayed for an injunction against the County Treasurer to prevent him from issuing such tax deed, and offering to pay the amount due under the tax sale certificate. The defendants' answer made no proper denials of the pertinent facts in the complaint. After the filing of the complaint, before the trial of the cause, the Treasurer issued the tax deed to Sennett. The lower court refused to grant plaintiff the relief which he prayed for on the ground that the tax deed had already been issued at the time of the trial, and that the question attempted to be litigated by the plaintiff was moot.

Held.—A tenant may not either alone or in conspiracy with any other person obtain the paramount title to land which he holds in his capacity as tenant. The issuance of the tax deed after the institution of the suit did not render the question moot, but, on the other hand, such deed was of necessity subject to the result of the litigation which had been started. The plaintiff, therefore, was entitled to his injunction.

Judgment Reversed and Remanded with Instructions.

MALPRACTICE—EXPERT TESTIMONY—EVIDENCE—NO. 12218—*Daly vs. Lininger—Decided April 7, 1930.*

Facts.—Daly, plaintiff below, sued Lininger, defendant below, for damages for malpractice. The testimony shows that Lininger operated on plaintiff's jaw; that during the operation there was a hemorrhage causing such a flow of blood that Lininger could not see clearly what he was doing, and as a result the left inferior dental nerve was severed. The lower court instructed the jury among other things, that the question of whether Lininger had used reasonable skill and diligence should be decided only from a preponderance of the evidence

of the *expert* witnesses. The plaintiff objected to this instruction and asked the court to instruct the jury that this was one of the class of cases in which the jury should be guided by the common experience of mankind as well as by the testimony of experts. Defendant also counterclaimed for the reasonable value of his services, but the plaintiff in her replication denied that there was anything due on account of such services. The lower court directed a verdict for defendant on the counterclaim and the jury returned a verdict in favor of the defendant on plaintiff's complaint for damages.

Held.—The lower court erred in instructing the jury, and the question of negligence should not be determined solely by the testimony of expert witnesses. It was also error to direct a verdict for the defendant on the cross complaint when the pleadings showed that the plaintiff had denied that there was anything due.

Judgment Reversed and a New Trial Ordered.

MINOR'S CONTRACTS—AGENT—JOINT CONTRACT—NO. 12266 —*Bessie M. Sipes vs. L. E. Sipes, et al—Decided April 21, 1930.*

Facts.—Daisy W. Sipes, the owner of a note and deed of trust executed by Bessie M. Sipes, died leaving as her heirs at law the defendants, L. E. Sipes, et al. The plaintiff sued L. E. Sipes individually and all of the defendants as heirs at law, setting forth that they were the owners of the note; that plaintiff agreed with L. E. Sipes as administrator and as agent for the other defendants that the note and trust deed were to be returned to plaintiff and that plaintiff was to convey the land secured thereby to defendants. It appears that two of the defendants are minors. The complaint prayed that if it should be found that L. E. Sipes was the agent for the other defendants, a reconveyance of the realty should be ordered. If it should be found that he was not such agent, complaint prayed for damages against him individually. The lower court sustained the demurrer to the complaint.

Held.—The demurrer was properly sustained. To reconvey was a joint obligation. The minors involved could not be bound through a supposed agent, therefore, none of the

defendants could be bound. There is no cause of action here against L. E. Sipes personally as an agent acting beyond the scope of his authority in presuming to deal for the minors because there is no statement in the complaint that the plaintiff was ignorant of the minority of two of the defendants.

Judgment Affirmed.

NEGLIGENCE—PERSONAL INJURY—PROXIMATE CAUSE—NO. 12262—*Stout, an infant, by O'Connell, his next friend vs. Denver Park and Amusement Company—Decided April 14, 1930.*

Facts.—The plaintiff, aged 19, was riding in a roller coaster car belonging to defendant. Plaintiff testified that during the course of the ride he was struck on the head by some unknown object. He was not strapped in the car at the time. He fell out of the car, was dragged along the track and finally managed to get back into the car. In the course of the fall he suffered an injury and brought this action to recover damages from the defendant company alleging that its failure to see that he was strapped in the car was the proximate cause of the injury. The lower court entered a directed verdict for the defendant.

Held.—In the absence of conflicting testimony, the determination of the proximate cause was for the court. Defendant's failure to see that plaintiff was strapped in the car was not the proximate cause, either alone or in conjunction with the blow which plaintiff received on the head.

Judgment Affirmed.

PERSONAL INJURY—NEGLIGENCE—ASSUMPTION OF RISK—NO. 12386—*Denver and Salt Lake Railway Company vs. Lombardi—Decided April 21, 1930.*

Facts.—Lombardi brought this action for damages alleging that he was a foreman for the Denver and Salt Lake Railway Company; that certain blasting operations were being carried on; that he stationed one Quintano to warn him of the fall of any rocks; that Quintano did not warn him of the fall of a rock which struck him and injured him. Quintano and

another laborer both testified that Quintano had shouted at the approach of the rock which injured plaintiff. Defendant alleged that plaintiff had assumed the risk incident to the operations in which he was engaged at the time of the accident.

Held.—Under the facts in this case the risks were not assumed because they were not fully known and appreciated.

Judgment Affirmed.

PUBLIC UTILITIES COMMISSION—FINDING OF FACT BY—ANTI-DUPLICATION ACT—NO. 12,254—*Utilities Commission et al vs. City of Loveland.*

Facts.—This action is actually between the City and the Public Service Company, each of which claims the exclusive right to furnish certain territory adjacent to the City with electricity. Under the socalled anti-duplication law, the Company filed a petition complaining that the defendant was in the course of constructing an electric line over territory already occupied by the Company. The City answered that no certificate was necessary because the territory in dispute was contiguous to its own lines, and was not already served by the Company. The Commission sustained the Company's petition and upon certiorari, the Commission's ruling was reversed by the District Court, and the petition was dismissed. The Commission prosecuted a writ of error to review the decision of the District Court.

Held.—"To sum up, we cannot say that the Commission was not justified in its findings of fact and its orders and judgment based thereon. We are not to be understood as saying that the Public Utilities Commission has unlimited and unrestricted power in making findings of fact and in entering orders and decrees. It is sufficient to say in this case that no constitutional or statutory provisions have been violated by the Commission and that the evidence before it fully justified the orders which it made, and that the District Court either in a Code writ of *certiorari* or by the writ of review provided by the Utilities act, if there is any difference between them, was not justified in its judgment setting aside the orders of the Utilities Commission."

Reversed and remanded.

PLEADINGS—AMENDED COMPLAINT—EFFECT OF—RIGHT TO FILE—NO. 12297—*H. C. Burson vs. J. E. Adamson et al.—Decided May 26, 1930.*

Facts.—This was an action to recover losses sustained by the plaintiff as a result of the alleged fraud, deceit, and conversion of his property by the defendants. The complaint originally embodied three separate causes of action for the one wrong. To the complaint, the defendant filed a motion to make more specific and certain. This motion was allowed and an order of court was also had to make the plaintiff elect as to which of the causes of action he would pursue. To the plaintiff's bill of particulars, the defendant filed a motion to strike the bill from the files, and to dismiss the complaint because the bill of particulars did not set out the information which the court required, and for the further reason that the bill of particulars was a sham pleading. Thereafter, the plaintiff filed an amended complaint. The defendant moved to strike the amended complaint on the grounds that the court had not granted leave to amend, and that the amended complaint was a sham pleading, and also that in no sense did it comply with the order of the court to make more specific, it being ambiguous and merely a repetition of the original complaint. The court, thereupon, of its own motion, dismissed the action without prejudice.

Held.—1. The plaintiff, by compliance with the order to elect which of his causes of action he would pursue, waived the adverse ruling on this point. The court, however, infers that the plaintiff need not have made the election.

2. When the plaintiff complied with the order to make more specific and certain, he waived any error that might have existed in granting the order. "All objections to rulings on motions or demurrers attacking a complaint, except as to jurisdiction and want of facts are waived by answering over." Williams vs. Smith 76 Colo. 151 and Erisman vs. McCarty 77 Colo. 289, wherein there is announced the doctrine that error, if any, in overruling a demurrer to a complaint upon the ground of insufficiency of facts to constitute a cause of action is waived by answering over, are expressly overruled.

3. By filing his amended complaint, the plaintiff waived

error, if there was error, on the part of the court in striking the bill of particulars.

4. An amended complaint should not be filed without leave of the court.

Judgment Affirmed.

RAPE—EVIDENCE—OUTCRY — DELAY—NO. 12572—*Losasso vs. People of the State of Colorado—Decided April 7, 1930.*

Facts.—Losasso was convicted of statutory rape. The evidence indicated that the offense was committed in May, 1929, that there was no outcry by the girl, and that the information was not filed until the following October. The complaining witness testified variously that the offense was committed May 9, May 16, and April 16. Losasso's counsel contends that the delay in prosecution and the contradictions in the testimony so weakened the case of the prosecutor that the facts are insufficient to support the verdict.

Held.—This was a verdict rendered on conflicting evidence and must stand.

Judgment Affirmed.